

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT AND ELIZABETH MATTICE,

Plaintiff-Appellant/Cross Appellee,

V

SALISBURY AND MAY CONSTRUCTION,
LLC,

Defendant-Appellee/Cross
Appellant.

UNPUBLISHED
November 1, 2011

No. 299132
Mason Circuit Court
LC No. 08-438-NO

Before: STEPHENS, P.J., and SAWYER and KELLY, JJ.

PER CURIAM.

Plaintiffs appeal and defendant cross-appeals from an order of the circuit court granting summary disposition in favor of defendant according to MCR 2.116(C)(7) (claim barred by limitations period). Plaintiffs appeal as of right and we affirm in part, reverse in part, and remand.

Plaintiffs contracted with defendant in 2002 to remodel a home that plaintiffs' purchased in 2000. The construction work was completed and plaintiffs moved into the home around April 2003. Plaintiffs alleged that they discovered a bird nest in the venting above their bathroom fan in 2008, and that the birds were able to access the interior of the home due to an uncovered vent hole cut into the soffit. Plaintiffs alleged that defendant was negligent in not covering the hole during construction and liable for the damages that were allegedly caused by bird mites that infected the home purportedly from the bird nest.

Plaintiffs argue that the trial court erred in finding that a one-year warranty clause in the construction contract limited the time that they could file this claim. Plaintiffs' argument is premised on their belief that this cause of action arises in tort, as opposed to contract. Upon de novo review, *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010), of all documentary evidence, and accepting the complaint as factually accurate unless specifically contradicted by the evidence, *Kuznar v Raksha Corp*, 481 Mich 169, 175-176; 750 NW2d 121 (2008), we are in partial agreement with plaintiffs. We conclude that although this action is properly characterized as arising in contract, the trial court erred in concluding that the action was precluded by the contract's limitation on warranty claims.

In order to sustain a negligence action, plaintiff must prove duty, breach of duty, proximate cause, and damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). A relationship giving rise to a duty can be established by contract. *Antoon v Community Emergency Med Serv, Inc*, 190 Mich App 592, 595; 476 NW2d 479 (1991). A plaintiff can maintain an action in tort for nonperformance of a contract only where there was a separate and distinct duty imposed by law. *Fultz v Union-Commerce Associates*, 470 Mich 460, 469-470; 683 NW2d 587 (2004); *Casey v Auto Owners Ins Co*, 273 Mich App 388, 401-402; 729 NW2d 277 (2006).

We find that plaintiffs' assertion that damages were incurred as a result of defendant's failure to cover the vent hole in question amount to an allegation that defendant did not perform its contractual duties in a work-person like manner or free from defect. Sections 14 and 15 of the contract each addressed defendant's duty to complete its tasks in a manner free from defect or generally acceptable according to the custom and practice of the industry. Because the parties set forth the duty in question in the terms of the contract, plaintiffs have not demonstrated the existence of a duty that is separate and distinct from the contract. As a result, the cause of action arises in contract not tort.

Because we conclude that plaintiffs' cause of action arises in contract, we must next determine whether the contract's terms limited plaintiffs' ability to bring this suit. MCL 600.5839(1) provides a six-year period in which a plaintiff can bring suit against a contractor. Here, a final certificate of occupancy was issued February 13, 2003, and the complaint was filed on October 29, 2008. However, defendant argues that the parties contracted to shorten the six-year period. An unambiguous contractual provision providing for a shortened period of limitations is enforced as written unless the provision would violate law or public policy. *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005).

Section 14 of the agreement between the parties provided, in relevant part as follows:

Contractor warrants the work to be free from defects in materials and workmanship for a period of one year from the date of substantial completion. . . . Items repaired or replaced shall carry an extended one-year warranty from the date of repair or replacement but in the event of further warranty or repair the extended one-year warranty shall not be lengthened. . . .

Section 15 of the construction agreement provided a limitation of liability:

Contractor shall not be liable for any claim for damage to person or property arising out of or attributable to any claimed defect or characteristic of the material used or the method of installation used in the work performed if the materials and methods of installation used were of a type and quality generally accepted in the building trades in Northwest Michigan for the type of construction involved in the work.

Section 13 of the agreement provided for a process for inspection of the substantially completed project by the parties, resulting in a "punchlist" of items necessary to complete the project.

Defendant argues that the trial court correctly read these provisions together in determining that the parties contract required that claims for defective work issues, such as a missing vent cover, were to be addressed through the punchlist process or within the year following completion of the project. However, § 14 specifically provides for repairing and replacing defective work within the one-year period, rather than limiting a period that plaintiffs could seek damages to person and property. Moreover, there is a question of fact regarding whether the construction of the vent in issue satisfied the *generally acceptable* standard in § 15 of the construction agreement. The inclusion of the qualifying standard demonstrates that the parties contemplated disputes or actions beyond the warranty of work in § 14, i.e., if the “method[] of installation used were of a type and quality [not] generally accepted in the building trades in Northwest Michigan,” then a cause of action would lie regardless of the one-year limit. Thus, the trial court erred in limiting plaintiffs’ claim for damages due to alleged construction defects to the one-year period for warranted repairs.

We note that defendant asserts that summary disposition was appropriate because the trial court determined that the damages were not foreseeable and plaintiff has failed to challenge that determination on appeal. Since we have found that this case is one in contract, any failure to address the tort issues is irrelevant. Defendant further argues that the trial court erred in considering the testimony of Nicole Grosjean. A review of the record demonstrates that in granting the motion for summary disposition, the trial court gave an extensive description of its reasoning regarding the cause of action being classified as a breach of contract claim. In contrast, the court did not extensively opine on defendant's proffered defenses, which exclusively relied on case law developed from tort causes of action. Because we agree that the cause of action lies in contract, we agree that defendant's arguments relating to liability for negligence need not be addressed. While defendant may eventually offer similar arguments to refute its liability for the damages that occurred as a result of the alleged breach of contract, those arguments were not made to the trial court.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly